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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

MICHAEL O. LEAVITT, as Governor of the State of Utah; and JAN GRAHAM, as Attorney General of the State of Utah,

Petitioners,

—v.—

JANE L., JANE F., and JULIE S., on behalf of themselves and all others similarly situated; *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Utah's statute banning abortion after 20 weeks violates the purpose or effect prongs of the undue burden test established by this Court in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)?

2. Whether defining viability of the fetus as occurring at 20 weeks gestation is unconstitutional because it prevents physicians from determining viability on an individual, case-by-case basis?

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Respondents Jane L., *et al.*, respectfully submit the following brief in opposition to the petition for certiorari filed by the Governor and the Attorney General of Utah (hereinafter "petitioners" or "the State"), docketed on March 18, 1997.

COUNTERSTATEMENT OF THE CASE

In 1991, Utah enacted a criminal ban on nearly all abortions, codified as Utah Code Ann. § 76-7-302 ("the ban"). *See* Pet. 2-3.[1] The ban permits abortions only in four narrow circumstances: (1) where an abortion is necessary to save the woman's life; (2) where the pregnancy is the result of rape, rape of a child, or incest as defined by Utah Code Ann. §§ 76-5-402, 76-5-402.1, 76-5-402(10) or 76-7-102, that was reported to a law enforcement agency prior to the abortion; (3) where an abortion is necessary to prevent "grave damage" to the woman's "medical health"; and (4) where the abortion is necessary to prevent the birth of a child that would be born with "grave defects." Utah Code Ann. § 76-7-302(2). After 20 weeks gestation, the ban no longer permits abortions in cases of rape and incest. Utah Code Ann. § 76-7-302(3).

In enacting a new § 302 and repealing the former section, the legislature deliberately obliterated the distinction in prior Utah law between the legality of post- and pre-viability abortions in order to test the limits of *Roe v. Wade*, 410 U.S. 113 (1973). Former § 302(3), passed in

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[1]Citations to the Petition for Certiorari are in the form "Pet. __"; citations to the appendices to the petition are in the form "A-__" (court of appeals opinion), and "B-__" (district court opinion). In addition, citations to portions of the record not contained in the appendix to the Petition are given as citations to the appellants' appendix in the court of appeals ("Aplt. App."), or as citations to the appellees' supplemental appendix in the court of appeals ("Aplees. Supp. App.").

1973 and re-enacted in 1974, had attempted to follow *Roe* by prohibiting post-viability abortions except when necessary to "save the life of the pregnant woman or to prevent serious and permanent damage to her health."[2] Section 302, on the other hand, criminalized nearly all abortions, both before and after viability. Although the 1991 ban phased out an exception for women pregnant as a result of rape or incest after 20 weeks gestation, Utah Code Ann. § 76-7-302(3), this dividing line was not intended as a viability cut-off. As the district court held, women seek abortions after 20 weeks for both viable and non-viable fetuses. *See* B-20.[3]

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[2]Former section 302 provided:

> An abortion may be performed in this state only under the following circumstances:
>
> (1) If performed by a physician; and
>
> (2) If performed ninety days or more after the commencement of the pregnancy, it is performed in a hospital; and
>
> (3) If performed when the unborn child is sufficiently developed to have any reasonable possibility of survival outside its mother's womb, the abortion is necessary to save the life of the pregnant woman or to prevent serious and permanent damage to her health.

[3]Every time the Utah legislature sought to regulate post-viability abortions from 1973 onward, it used the medical and legal definition of viability set forth in *Roe* and subsequent cases, viz., the phrase "sufficiently developed to have any reasonable possibility of survival outside of the mother's womb." *See, e.g.*, Utah Code Ann. §§ 76-7-307, 308, former § 302. The failure to use this definition, or any other similar phrase denoting viability, in the ban, taken together with the (continued...)

Instead of allowing abortions without restriction before viability, as required by *Planned Parenthood v. Casey*, 505 U.S. 833, 879 (1992), and instead of permitting abortions to protect the woman's life and health after viability, as required by *Roe v. Wade*, 410 U.S. 113 (1973), the ban requires that a physician find "grave damage" to the woman's health for all abortions, whether before or after viability. Utah Code Ann. § 76-7-302(2)(d).[4]

The district court invalidated the pre-20-week ban on abortions, *see* B-12, and the State did not appeal that ruling. However, the district court severed the post-20-week ban and upheld its constitutionality, holding that, although it would apply to abortions of *both* "non-viable [and] viable" fetuses, the prohibition "of such late, non-

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[3](...continued)
context in which the ban was passed, demonstrates that the legislature did not intend to define 20 weeks as viability. Rather, the 20-week limit reflected a disapproval of some women, particularly rape and incest victims, who would seek late abortions. The district court itself appears to have adopted this view. *See* B-20 ("Twenty weeks certainly constitutes fair notice to the woman of the abortion ban to be imposed, and her consent to abide by the ban except for health reasons fairly can be implied.").

[4]The 1991 Utah statute failed in another respect to give clear preference to the woman's health over the state's interest in the fetus after viability. Like the post-20-week ban, the 1991 amendments to Utah's choice-of-method statute required that the method favor survival of the fetus unless necessary to avert "grave damage" to the woman's health. Utah Code Ann. §§ 76-7-307 & -308. These provisions were invalidated by the court of appeals, *see Jane L. v. Bangerter*, 61 F.3d 1493, 1502-05 (10th Cir. 1995), *rev'd on other grounds sub nom. Leavitt v. Jane L.*, 116 S. Ct. 2068 (1996), and are no longer at issue in this case.

therapeutic abortions does not impose an undue burden on a woman's liberty interest." B-20.[5]

The court of appeals reversed, finding the ban nonseverable. *Jane L. v. Bangerter*, 61 F.3d 1493, 1499 (10th Cir. 1995). In *Leavitt v. Jane L.*, 116 S. Ct. 2068 (1996), this Court reversed the decision of the court of appeals, holding that the ban was severable, and remanded the case to the court of appeals for further proceedings.

On remand, the court of appeals held that the post-20-week ban is unconstitutional because it "has both the purpose and effect of placing a substantial obstacle in the path of a woman seeking to abort a nonviable fetus." A-12. The court of appeals did not formally reach plaintiffs' claim that the post-20-week ban is unconstitutional because, as to post-viability abortions, it does not provide an adequate exception for abortions necessary to protect a woman's health. *See* A-13 at n.7. Nevertheless, the court of appeals observed that it had "addressed identical language" in its prior opinion invalidating Utah's choice-of-method statutes (Utah Code Ann. § 76-7-307 & -308). *Id.*

REASONS FOR DENYING THE WRIT

The State has failed to establish any of the factors that weigh in favor of a grant of certiorari. Indeed, the State is unable to point to the decision of any United States court of appeals or state court of last resort that purportedly conflicts with the decision of the court below. Instead, the

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[5]The district court found that the 20-week cut-off meant that the ban applied only for abortions in or after the 21st week gestation or in or after the 23rd week as measured from the last menstrual period (lmp) because the statute used the words "[a]fter 20 weeks." *See* B-9.

State argues that the decision of the court of appeals is at odds with this Court's decision in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). However, far from being at odds with *Casey*, the decision reached by the court of appeals is required by *Casey* and previous precedents of this Court.

In addition, the State attacks the holding of the court of appeals that the district court committed clear error in finding, as a matter of fact, that "the record contains no evidence that any woman wants or has attempted to obtain" a nontherapeutic abortion after 20 weeks. A-12. The holding of the court of appeals of clear error is, however, fully supported by the record.[6]

I. THE COURT OF APPEALS CORRECTLY APPLIED THIS COURT'S DECISIONS IN HOLDING THAT UTAH'S POST-20-WEEK BAN IS UNCONSTITUTIONAL.

The court of appeals correctly applied *Casey*'s undue burden test in holding that the post-20-week ban has the purpose and effect of imposing a substantial obstacle in the path of women seeking previability abortions. *See Casey*, 505 U.S. at 879 ("Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability."). Faced with this straightforward application of *Casey*, the State seeks to rescue Utah's post-20-week ban by casting it as a post-

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[6]Even assuming, *arguendo*, that the court of appeals improperly corrected a factual error by the district court, such an improper correction, standing alone, is not a compelling basis for this Court to grant review. *See* Point II *infra*.

viability ban and arguing that, after *Casey*, "the legislature may constitutionally fix a point after which women can no longer obtain abortions, with exceptions for pregnancies that endanger a woman's life or health." Pet. 8.

The State's effort fails for three reasons. First, the post-20-week ban has the purpose and effect of prohibiting previability abortions and is therefore unconstitutional under *Casey*. Second, *Roe*, as reaffirmed by *Casey*, requires that viability be determined on a case-by-case basis, and prohibits states from creating an irrebuttable presumption of viability. Third, even as to the post-viability abortions it restricts, the ban does not contain a constitutionally adequate health exception.

A. The Ban Imposes An Undue Burden On Pre-Viability Abortions.

The court of appeals held that the ban violates both the purpose and effect prongs of *Casey*'s undue burden test.

1. Purpose

Illegitimate purpose alone will invalidate a law under *Casey*. *Id.*, 505 U.S. at 877; *see also Armstrong v. Mazurek*, 94 F.3d 566 (9th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3507 (U.S. Jan. 13, 1997) (No. 96-1104); *A Woman's Choice v. Newman*, 904 F. Supp. 1434, 1462 (S.D. Ind. 1995) ("a state's desire to reduce the rate of abortions by making them more difficult to obtain is not [a legitimate and constitutional purpose]"), *appeal stayed*, No. 95-3965 (7th Cir. Jan. 22, 1996); *Benten v. Kessler*, No. CV-92-3161 (CPS), 1992 U.S. Dist. LEXIS 14747, at *13 (E.D.N.Y. Sept. 30, 1992) (order denying motion to intervene) ("*Casey* reinforces *Danforth* by drawing a clear line between those regulations that provide information and

those that actually effect substantive regulation on a woman's right to choose to terminate her pregnancy with the sole purpose of impeding abortion.").

Casey requires that a court first inquire carefully into the purpose of a law regulating abortion. *Casey* deliberately adopted a purpose analysis for two reasons. First, examination of purpose protects women from statutes subjected to lesser scrutiny under the undue burden standard than under the strict scrutiny of *Roe*; to offset the greater latitude given to the States to restrict abortion, the Court in *Casey* required States to act based on genuine health purpose. Second, an examination of purpose prevents the enactment of statutes to coerce and harass women without justification. Where, as here, the State's purpose to hamper access to abortion is clear, *Casey*'s concerns have special force.

Though a state may prohibit post-viability abortions when there is no danger to a woman's life or health, the purpose of prohibiting as many pre-viability abortions as possible is *not* permissible. Any previability restrictions must be "calculated to inform the woman's free choice, not hinder it." *Casey*, 505 U.S. at 877. Unlike the persuasive informational requirements upheld in *Casey*, Utah's post-20-week ban is purely coercive; its only plausible purpose is to "hinder" some women from obtaining pre-viability abortions. Therefore, the court of appeals properly held that it fails the purpose prong of *Casey*'s undue burden test.

In its first opinion, the court of appeals found that the purpose of the law was to "provide a vehicle by which to

challenge *Roe v. Wade*." A-10 (citing 61 F.3d at 1495).[7] In the opinion of which the State seeks review by this Court, the court of appeals further wrote:

> In our view, the State's determination to define viability in a manner specifically and repeatedly condemned by the [Supreme] Court evinces an intent to prevent a woman from exercising her right to choose an abortion after twenty weeks in those instances in which the fetus is not viable. This intent is confirmed by the State's brief on appeal, in which the State in essence concedes that the section was intended to prevent the nontherapeutic abortion of nonviable fetuses after twenty weeks because in the State's view women who seek such abortions have waited too long.

A-10.

The State concedes even more in this Court. It first misconstrues the Joint Opinion in *Casey* as holding the view that "a woman who fails to exercise her right to choose abortion before viability has consented to the state's intervention on behalf of the developing child." Pet. 17 (citing *Casey*, 505 U.S. at 870 ("*In some broad sense it might be said* that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child.") (emphasis added)). The State then seeks to apply this misconstruction to women seeking abortions *before* viability:

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[7]Indeed, in reversing the severability decision of the court of appeals, this Court accurately characterized the "substantive intent" of the Utah Legislature as "bent on banning most abortions." *Leavitt v. Jane L.*, 116 S. Ct. at 2072.

> A woman knows she is pregnant long before she reaches her 21st week of pregnancy, the point after which she will no longer be able to obtain an abortion on demand under subsection 76-7-302(3). If she does not choose terminate her pregnancy before then, this Court's reasoning comes fairly into play.

Pet. 17. Thus, Utah's post-20-week ban has nothing (of course) to do with "informing" the woman's choice, *see Casey*, 505 U.S. at 877; the ban is designed, pure and simple, as a punishment for those women who do not exercise their right to choose abortion early enough in pregnancy to satisfy the State. The ban is a transparent effort to regulate previability abortions as though they were post-viability abortions, and thereby defy the clear guidance this Court established in *Casey*: that before viability, the State may not prohibit *any* woman from obtaining an abortion. 505 U.S. at 879.

2. Effect

The court of appeals also correctly held that the effect of the ban is to impose a substantial obstacle in the path of women seeking previability abortions. *See* A-11 (for "those women seeking nontherapeutic abortions of nonviable fetuses after twenty weeks from conception" "section 302(3) imposes more than a substantial obstacle; it constitutes an outright ban"). Under *Casey*, the ban is an undue burden and therefore invalid because "in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." *Id.*, 505 U.S. at 895.

Under the district court's interpretation of subsection (3), the statute only restricts abortions at 23 weeks lmp and

later. In *Casey*, the Court wrote that "at 23 to 24 weeks [viability] *sometimes* [occurs] . . . " 505 U.S. at 860 (emphasis added). In fact, at 23 or 24 weeks lmp, viability *usually* does not occur. *See* Whyte, et al., *Extreme Immaturity: Outcome of 568 Pregnancies of 23-26 Weeks' Gestation*, 82 OBSTETRICS & GYNECOLOGY 1 (1993).[8] Moreover, the State's own expert witness, Dr. DeVore (whom the State now chooses to ignore), testified that viability is at 24 weeks lmp. Aplt. App. 140.[9] Thus, *most* women obtaining abortions at 23 or 24 weeks lmp are obtaining *previability* abortions. This subset of women certainly constitutes a "large fraction of the cases" to which the ban applies.

Moreover, as found by this Court, there is a wide margin of error in judging viability. Because estimates of gestational age by ultrasound are often inaccurate by as much as four weeks in either direction, *see Webster v. Reproductive Health Servs.*, 492 U.S. 490, 516 (1989) (opinion of Rehnquist, C.J., joined by White & Kennedy,

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[8]This recent study showed that among a total of 55 23-week fetuses, 41 died (over 74%); and among 114 24-week fetuses, 60 died (over 52%). *See id.* at 4 (Table 2).

[9]The record is replete with expert testimony that viability typically occurs after 24 weeks, at the earliest. Dr. Warenski, who has over twenty years of experience as an obstetrician-gynecologist in Utah, testified that the earliest he had ever seen a fetus delivered and survive was "Probably 24 weeks." Aplt. App. 130; *see also* Aplt. App. 96 (severely growth-retarded 24-week fetus may not be viable); Aplt. App. 107 ("I'm not sure that we've had any 23-weekers survive."). Significantly, the Supreme Court in *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989), adopted a district court finding that "'23½ to 24 weeks *gestation* is the earliest point in pregnancy where a reasonable possibility of viability exists.'" *Id.* at 515-16 (opinion of Rehnquist, C.J., joined by White & Kennedy, JJ.) (emphasis added) (quoting 662 F. Supp. 407, 420 (W.D. Mo. 1987)).

JJ.), many women seeking abortions in Utah after about 16 weeks would be unable to obtain them under the ban. Utah State Statistics for 1990 reveal that as many as 167 women aborted their pregnancies after 15 weeks gestational age. Aplt. App. 207. Many of these pre-viability abortions would be unduly burdened by the ban.[10]

It does not matter that some of the late abortions performed in Utah from 1974 until 1990, *see* Pet. 13, may have been performed for "therapeutic" reasons.[11] Under *Casey*, if a woman is carrying a nonviable fetus, she has a right to terminate the pregnancy without justifying the abortion to the State. However, under the ban, the woman must satisfy her physician that the abortion is necessary for one of the three reasons allowed under the law.

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[10]Medical terminology and usage generally define an abortion as only pre-viability. *See, e.g.*, F. GARY CUNNINGHAM ET AL., WILLIAMS OBSTETRICS at 665 (19th ed. 1993) ("Abortion is the termination of pregnancy by any means before the fetus is sufficiently developed to survive."). Those terminations done after viability are denoted "early induced deliveries," the phrase used by both plaintiffs' and the State's experts. Therefore, although Utah law does have a category of "post-viability" abortion, in practice these are often labelled induced deliveries and reported as such.

[11]Nor has the State established that the coding for "therapeutic" abortions in state statistics has the same definition as the ban's exceptions. In fact, the undisputed testimony from the director of the clinic which provides second trimester abortions was that she did not code rape and incest often, and that every year she refers 10-15 women needing abortions after 22 weeks lmp out of state. *See* Aplees. Supp. App. 158-60.

B. The Ban, Even If Intended As A Definition of Viability, Creates An Irrebuttable Presumption Of Viability At 20 Weeks In All Cases, And Is Therefore Invalid Under This Court's Precedents.

The State seeks to rescue the ban by casting it as an effort by the Utah Legislature to define viability at 20 weeks from conception (22 weeks lmp). Even assuming, *arguendo*, that the legislative history of the 1991 amendments supported this construction of subsection (3) -- and it does not[12] -- government demarcation of viability is not permitted under the directly controlling precedent of this Court.

First, in *Casey*, this Court reaffirmed that "viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on non-therapeutic abortions." *Id.*, 505 U.S. at 860. Thus, "*[w]henever it may occur*, the attainment of viability . . . serve[s] as the critical fact." *Id.* (emphasis added). In recognizing that viability does not occur at the same point in every pregnancy, *Casey* follows a line of earlier Supreme Court precedents.

In *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), this Court rejected the position that "a specified number of weeks must be fixed by statute as the point of viability." *Id.* at 65. Indeed, this Court found that:

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[12]In any event, the district court construed the post-20-week ban as defining viability. *See* B-13. But the holdings of *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), and *Colautti v. Franklin*, 439 U.S. 379 (1979), quoted below apply to both legislative and *judicial* definitions of viability; neither is permitted.

> it is not the proper function of the legislature or the courts to place viability . . . at a specific point in the gestation period. The time when viability is achieved may vary with each pregnancy, and the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician.

Id. at 64.

Three years later, in *Colautti v. Franklin*, 439 U.S. 379 (1979), the Court reaffirmed this principle:

> Viability is reached when, in the judgment of the attending physician on the particular facts of the case before him, there is a reasonable likelihood of the fetus' sustained survival outside the womb, with or without artificial support. Because this point may differ with each pregnancy, *neither the legislature nor the courts may proclaim one of the elements entering into the ascertainment of viability -- be it weeks of gestation or fetal weight or any other single factor -- as the determinant of when the State has a compelling interest in the life or health of the fetus.*

Id. at 388-89 (emphasis added). *See also Hodgson v. Lawson*, 542 F.2d 1350, 1354 (8th Cir. 1976) (striking Minnesota statute stating that fetus during second half of gestation period is "potentially viable"); *Floyd v. Anders*, 440 F. Supp. 535 (D.S.C. 1977), *vacated on other grounds & remanded*, 440 U.S. 445 (1979). Under these decisions, the State's plea that the petition must be granted to answer the question whether a State may "make a legislative judgment on viability" must be rejected: the question has already been answered, and the answer is no. *See also* A-

10 at n.6 (opining that *Casey* leaves *Roe, Danforth, Colautti*, and *Webster* as the precedents that "govern the issue" of how viability may be defined).

The Utah statute does exactly what is prohibited under *Casey* and the prior holdings of this Court. It bans abortions after 20 weeks even if, in the physician's medical judgment, the fetus is not viable. The ban wrests from the physician all discretion to make the viability determination and will ban a significant percentage of late but nonetheless pre-viable abortions. Under *Casey* and earlier decisions, this is unconstitutional. *Casey*, 505 U.S. at 878.

Nothing in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), compels a different conclusion. In *Webster*, the Court upheld a Missouri law that required physicians to perform tests necessary to make a determination of viability at 20 weeks. Justice O'Connor, who provided the key vote to uphold the statute, found that this provision did not "conflict with any of the Court's past decisions concerning state regulation of abortion." *Id.* at 525 (O'Connor, J., concurring in part and concurring in the judgment). Therefore, *Webster* in no way casts doubt on either *Danforth* or *Colautti*.

C. The Ban Does Not Contain An Adequate Exception For Post-Viability Abortions Necessary To Protect The Woman's Health, So The Ban Is Invalid Under *Roe* And *Casey*.

Under *Roe v. Wade*, 410 U.S. 113 (1973), the State may proscribe abortion "except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Id.* at 164-65. This precise language from *Roe* was specifically quoted and reaffirmed in *Casey*, 505 U.S. at 846; *see also id.* at 880 ("the

essential holding of *Roe* forbids a State from interfering with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health"). Under *Roe* and *Casey*, the ban -- even viewed as a post-viability ban -- is constitutionally inadequate. *See* A-13 n.7.

The ban allows health-saving abortions only when necessary "to prevent *grave* damage to the pregnant woman's medical health." Utah Code Ann. § 76-7-302(2)(d) (emphasis added). Because it permits only those post-viability abortions necessary to prevent *grave* damage to the woman's health, the ban violates *Roe*'s mandate that a such restrictions have an exception for abortions necessary to protect the woman's "health." Neither *Casey* nor *Roe* differentiates between different degrees of damage to health, but leaves these difficult judgments to physicians who must render this necessary medical care.

In an unbroken line of cases from *Roe* to *Casey*, this Court has established that the physician must be given the discretion to determine that the health of the woman necessitates an abortion after viability. In *Colautti v. Franklin*, 439 U.S. 379 (1979), this Court condemned any "'trade-off' between the woman's health and additional percentage points of fetal survival." *Id.* at 400. It follows that if the State may not trade off the woman's health for fetal survival, it may not require the woman to bear an increased health risk, as Utah's statute does, before she may obtain a post-viability abortion at all. In *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), this Court re-affirmed this holding of *Colautti*, emphasizing "that maternal health [must] be the physician's paramount consideration." *Id.* at 768-69. Just as in *Thornburgh* the phrase "significantly greater medical risk" heightened the health risk imposed on the woman and

rendered the Pennsylvania choice-of-method statute invalid, here the adjective "grave" heightens the health risk a woman must endure before she may obtain an abortion. Moreover, because "grave" is an inherently vague term, physicians fearful of severe criminal penalties will be chilled in the provision of post-viability abortions to protect women's health, because their judgment that a condition is "grave" may easily be second-guessed by prosecutors.

The court of appeals reasoning in finding Utah's choice of method restriction invalid is directly applicable to the language of the ban:

> According to *Casey, Thornburgh,* and *Roe*, concern for the "preservation" of a woman's health suffices to elevate her liberty interests decisively above those of the state or the unborn child. By requiring a woman to suffer "grave damage" to her health before her liberty interests predominate, the Utah legislature violated those portions of *Roe* and *Thornburgh* that *Casey* reaffirmed, and unconstitutionally devalued a woman's privacy rights.

Jane L., 61 F.3d at 1504, *rev'd on other grounds sub nom. Leavitt v. Jane L.*, 116 S. Ct. 2068 (1996).

The State seeks to equate "preservation of health" -- the language of *Roe* -- with "grave damage to the woman's health," the language of § 76-7-302(2)(d). This equation is only possible if "grave" is read out of the statute or assigned no meaning. It is elementary "that a statute should be interpreted so as not to render one part inoperative" or unnecessary. *Colautti*, 439 U.S. at 392; *see also Thornburgh*, 476 U.S. at 769 (accepting court of appeals holding that adverb "significantly" in Pennsylvania statute

could not be reduced to surplusage, and that language of the statute "is not susceptible to a construction that does not require the mother to bear an increased medical risk in order to save her viable fetus") (quoting court of appeals); *Faux v. Mickelsen*, 725 P.2d 1372, 1374 (Utah 1986). Equating "grave damage to the pregnant woman's medical health" with "health," as the State seeks to do, violates this canon of construction. Moreover, there is ample evidence in the record that "grave damage to health" -- whatever it may mean -- exceeds "damage to health."[13]

Thus, even if, contrary to governing precedent of this Court, Utah were permitted to enact a bright-line definition of viability, the ban it enacted is invalid because it flouts the command of *Roe* and *Casey* that, even after viability, a ban on abortions must contain an exception for the woman's health.

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[13]Dr. Dwight Cruikshank, one of the State's own expert witnesses, defined "grave" as "[l]oss of structure or function, shortening of life, irremediable pain and suffering." Aplt. App. 95. Another of the State's witnesses, Dr. Richard Hebertson, equated "grave" with "[s]erious, complex, threatening," Aplt. App. 93, and Dr. Watson Bowes, another witness for the State, testified that grave meant "serious, severe." Aplt. App. 136. Similarly, several plaintiffs also testified at depositions that the adjective "grave" was restrictive. Dr. Kenneth Ward was inclined to define grave as "important and serious" based on a dictionary he consulted. Aplt. App. 178. Dr. Neil Kochenour testified at deposition that, although there would be disagreement about what qualified as "grave," "physicians would take a very conservative approach to what is grave because they don't want to . . . break the law." Aplt. App. 101. These opinions are consistent with the legislative history of the ban, which glibly substituted the term "grave" for the phrase "serious and permanent."

II. THE COURT OF APPEALS PROPERLY HELD THAT WOMEN SEEKING ABORTIONS IN UTAH ARE AFFECTED BY THE BAN.

In order to circumvent the plain irreconcilability between Utah's law and *Casey*, the State argues that no women would be affected by Utah's post-20-week ban. The Court of Appeals, however, set aside as erroneous the district court's finding of fact that no woman "wants or has attempted to obtain" a late abortion prohibited by the Utah post-20-week ban, and that holding is fully supported by the record. Moreover, the State's argument on this point does not in any event weigh in favor of granting the petition, for this Court will generally not review questions of fact. *See, e.g., NLRB v. Hendricks County Rural Electric Corp.*, 454 U.S. 170, 176 n.8 (1981).

There is ample evidence in the record that numerous women are unduly burdened by these restrictions. For example, chart no. 65886, Aplt. App. 227, describes a woman 21 weeks pregnant according to ultrasound who became pregnant as a result of rape, and chart no. 67133, Aplt. App. 232, describes another woman 21 weeks pregnant by ultrasound. *See also* Aplt. App. 235, 236 (woman 20-21 weeks pregnant as a result of rape); Aplt. App. 239, 241 (woman 20½ weeks pregnant; in jail; concerned about effects of her drug use on fetus); Aplt. App. 243, 245 (mentally handicapped woman 19 weeks pregnant who does not believe she can raise child alone). In addition, as the court of appeals pointed out:

> The record contains evidence through the declaration of the Utah Women's Health Clinic, a facility that performs approximately seventy-five percent of the abortions in Utah, that the Clinic routinely refers to another state those Utah

> residents needing an abortion after twenty weeks. She stated that in 1990, for example, the Clinic referred out of state ten to fifteen women who needed such abortions. Supp. App. of Aplees., at 158-60. While this and other evidence in the record indicate that the number of women in Utah desiring abortions after twenty weeks may be small, the *undisputed* evidence also demonstrates that some members of this group are women seeking nontherapeutic abortions of nonviable fetuses.

A-12 (emphasis added).

This Court should decline the State's invitation to re-assess these facts. "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925). Contrary to this basic principle, the State asks this Court to engage in a detailed review of the extensive factual record in order to save a doomed statute. The question of fact presented by the State simply "does not merit Court review," *Hendricks*, 454 U.S. at 176 n.8.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

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Respectfully submitted,

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